Supreme Court, U.S.
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No. 86-841

In The

Supreme Court of the United States

October Term, 1986

BATH IRON WORKS CORPORATION,

and

COMMERCIAL UNION INSURANCE COMPANY,

Petitioners,

vs.

BRUCE E. BOUFORD,

Respondent.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The "Question Presented" by the Petitioner describes a ruling of the Maine Supreme Judicial Court that was not made. If any question is to be decided, which respondent opposes, it would be: whether the Maine Supreme Judicial Court was correct in ruling that the appropriate credit to be given by the Maine Workers' Compensation Commission against previously received LHWCA benefits is a question governed by State law, and not governed by 33 U.S.C. § 903(e).

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STATEMENT OF THE CASE

The facts of this case are clearly set forth in the majority opinion of the Court below. Petition for Writ, p. 1-a. Also, it is important to the Petition before the Court that the weekly benefits for partial incapacity awarded by the LHWCA Administrative Law Judge and the Maine Workers' Compensation Commissioner were, respectively, $64.32 and $40.13. The employer did not actually have to pay the employee any Maine weekly benefits because of the credit allowed by the Maine Commissioner for the previously paid LHWCA benefits. Petition for Writ, p. 44-a. However, the employer wanted to apply the unused credit of $24.19 per week against the permanent impairment award of $16,053 also awarded by the Maine Commissioner pursuant to 39 M.R.S.A. § 56-A. See Petition for Writ, pp. 12-a - 13a.

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REASONS FOR DENYING THE WRIT

1. The Decision Below Turns Upon its own Facts.

The decision below turns upon its own facts. It will affect few litigants in Maine, and probably none outside of Maine. This case would have ended at the initial Commissioner level except for one unfortunate fact: the Federal Administrative Law Judge awarded to the employee $64.32 per week and the single Maine Workers' Compensation Commissioner awarded the employee $40.13 per week with appropriate inflation adjustments. This minor and temporary[1] difference accounts for this whole case.

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[1] In Maine this adjustment would transform an award of $40.13 in 1979 to a weekly award of a little more than $64.32 in 1985. 39 M.R.S.A. § 55.

The difference was the result of an accident, a tactical error, and is unlikely to repeat itself in the future.

First, it was an accident. The federal Administrative Law Judge did not state in his decree what percentage of partial benefits he was awarding. The state Commissioner awarded 25% benefits and stated:

> This specific finding of partial incapacity was awarded with knowledge that the employee has been receiving federal workers' compensation at a roughly equivalent rate and time period. (Petition for Writ, pp. 35a-36a.)

Apparently the single state Commissioner was under the impression that the federal award had been roughly 25%, probably due to an argument early in the case by employee's counsel, when actually the federal award was 39%.

Secondly, the difference in the two awards was the result of a tactical error on the part of employee's and, perhaps, employer's counsel. When the employee filed his state petition for partial benefits in 1984, the level of his incapacity back to March of 1979 was res judicata. Both parties to this litigation had been parties to the federal litigation at which the level of partial incapacity was the principal issue. (Petition for Writ, p. 45-a.) The matter had been fully and completely litigated and either party in the state proceedings could have required the state agency to accept the level of partial incapacity established by the federal decision. *Thomas v. Washington Gaslight*, 448 U.S. 261 (1979). In hindsight that is what counsel for the employee should have done.

If the Maine Commissioner had ordered the same amount of partial weekly incapacity benefits under Maine

law as had been awarded under the federal decree, as was his general intention, then there could be no reasonable dispute about the additional permanent impairment award made under 39 M.R.S.A. § 56-A. This is so because the employer would have been able to fully offset the $64.32 that had been paid since 1979 against the identical amount of weekly benefits that hypothetically would have been awarded by the Maine Commission. Thus, the permanent impairment award made by the Maine Commission under § 56-A would have clearly been complimentary and supplementary to the Federal Act, a superior benefit of the type clearly contemplated by *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 724 (1980).

The facts in this case are admittedly different. The State Commissioner did not award the same amount of weekly partial benefits as the Federal Administrative Law Judge did. But this fact is unlikely to repeat itself. Either party can avoid it by invoking res judicata. If they do not, a State Commissioner will be inclined, as was the Commissioner in this case, to make the same finding on percentage of incapacity for the same period as did a previous Federal Administrative Law Judge between the same parties.

Neither employees or employers are entitled to what they received in this case: two administrative trials concerning the level of incapacity for the same period of time. Thus, this case presents an unusual, probably unique, set of facts which is unlikely to be repeated.

There is a second peculiarity to this case. Maine is one of only a few states which adds to weekly incapacity benefits without any time limit a "permanent impairment"

benefit. Thus, Maine's permanent impairment benefit under 39 M.R.S.A. § 56-A is a benefit wholly unrelated to lost earning capacity. An employee does not have to miss even a single day of work in order to receive a permanent impairment award. The question of whether or not such a benefit is complementary and supplementary to LHWCA benefits, such that the federal benefits should not be offset against them, is one that will be rarely faced. Indeed, since *Sun Ship* was decided in 1980 research has not revealed any substantial litigation, state or federal, concerning this issue.

Thus, a decision of the issue presented in this case will affect few litigants because this case turns on its own peculiar facts.

2. There Are No Conflicting Decisions On The Issues Presented.

There are no conflicting decisions on the issue presented. The Petition cites only one case that even dealt with a crediting issue. *Landry v. Carlson Moring Services,* 643 F.2d 1080 (5th Cir. 1981), cert. denied, 454 U.S. 1123 (1981). However the case is distinguishable. It deals with what a Federal Administrative Law Judge should allow as a credit when a state has previously made a workers' compensation award, not vice-versa as in the instant case. Moreover, the rationale and result in the case support the respondent, not the petitioner. In *Landry* the Court denied a credit to an employer for that portion of the state compensation award which the employee had to pay to his attorney as attorneys' fees, even though the money came out of the employee's award of benefits. The Court held that to credit that amount against LHWCA

benefits would be to "mix apples and oranges." Id at 1088. Secondly, the Court implied that if the attorneys' fees had been a "separate element of damages" under Texas law rather than having been simply taken out of the state compensation award, the answer would have been more clearly that no credit should be allowed. Id. Maine's permanent impairment award is clearly a "separate element of damages." Thirdly, the Court cited *Globe Indemnity Company v. Calbeck*, 230 F.Supp. 14 (S.D. Tex. 1960), in which the Federal Court refused to allow a credit against LHWCA benefits for monies advanced to the employee by the employer before formal state compensation began, a credit allowed by Texas against Texas benefits but not allowed by the Administrative Law Judge against LHWCA benefits. Id at 17.

Thus, the Petitioner has not presented a single case in its Petition that either (1) concerns a state tribunal crediting LHWCA benefits against state compensation benefits, the situation in the instant case; or (2) shows a federal tribunal imposing a credit against LHWCA benefits for apparently dissimilar state benefits previously received. Therefore, this Court should not review the matter in the first instance, but leave the issue to development and consideration of the different State and District Courts. The matter is not ripe for the establishment of a nationwide principle of federal law.

3. The Decision Is Correct On Other Grounds.

The decision below is correct on other grounds. The Court would be unlikely to reach the question sought to be raised by the Petition. This is so for four reasons.

First, there can be no dispute that any permanent impairment award under state law made in this case is a benefit under Maine law that has no relationship to lost earning capacity. This is definitively established as a matter of *state law* by the Court below and is not reviewable.

Second, the state court below ruled that *as a matter of state law* credit would not be given against the award of permanent impairment for LHWCA benefits the employee had previously received for loss of weekly earning capacity. Indeed, a major point of the dissenting opinion in the decision below was a disagreement about state law. Petition for Writ, pp. 18-a - 19-a. It is clear that what divided the State judges below was the proper construction of the state statute: whether the Maine Workers' Compensation Act should be construed to require a credit in some circumstances and prohibit it in others.

No Supremacy argument has been made as yet that calls into question the constitutionality of the Maine Act. The heavily veiled suggestion that 33 U.S.C. § 903(e) federalizes the law of crediting is heavily veiled because a plain view of it would be repugnant. Since under *Sun Ship* states are free to provide more favorable benefits than the federal ones, and since the LHWCA does not pre-empt the field of compensation to harbor workers, then it is clearly a question of *state law* how much of a federal award a state chooses to credit against a state award or how much a state chooses to supplement the federal award. A state could, for example, provide for employer liability to employees for disfigurement, rehabilitation, child allowances, or other losses not covered by LHWCA. In or-

der for the State to assure that an employee receives these special benefits under state law, it is obviously necessary to prohibit these special compensations to be withheld because the employee has received a separate and distinct benefit under Federal law not compensating similar losses.

Thirdly, 33 U.S.C. § 903(e) upon which the petitioner rests almost its entire case provides as follows:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act.

This was § 3(b) of the 1984 Amendments, and applied to "claims filed after [Sept. 10, 1984] and to claims pending on such date." Longshore & Harbor Workers' Compensation Act Amendments of 1984, § 28. Since Mr. Bouford's "claim" for federal benefits had been adjudicated in 1981, three years before the Amendments, and since no claim has been filed with the federal agency since the Amendments, section 903(e) can have no relevance to this case.

Finally, the petitioners have no standing to seek a credit against the state permanent impairment award because they have not made the payments they seek credit for. All of the federal payments since February 5, 1982 have been made out of the Special Fund established pursuant to 33 U.S.C. § 908(f). Petition for Writ, pp. 79-a. Thus, the petitioners have made payments of $64.32 per week under the Federal Act from March 19, 1979 to February 5, 1982. The credit that they were allowed by the Maine Commissioner against a state weekly compensation award of $40.13 from March 19, 1979 to the present and

continuing, was the full amount of federal benefits paid since March 19, 1979. Petition for Writ, p. 37-a. This was in excess of what the petitioners themselves paid. If anyone is entitled to a credit against the state award, it is not the petitioners. They didn't pay it. They shouldn't receive it back. They lack standing.

For all the above reasons, it is unlikely that this Court would reach the question presented.

4. The Questions Presented Were Not Raised Or Preserved Below.

The petitioner argues:

> . . . the Court below went beyond its own legitimate policy interests and attempted to interpret the meaning or intent of the statutory provisions of the Longshore & Harbor Workers' Compensation Act, with which the State Court is neither involved nor familiar.

Petition for Writ, pp. 21-22. The argument was made repeatedly, not only to the lower Court, but to all three levels below that the State tribunals were not qualified to construe or intrepret the Federal Act.

It is difficult to see how petitioner raised his federal question when he argued that the state authorities ought not to have attempted to construe the LHWCA.

5. The Decision Below Was Correct.

The decision below was correct, for all the reasons listed by the majority opinion of the Maine Supreme Judicial Court. The Maine Act complements the Federal Act by compensating an injured worker for a loss that the Federal Act does not compensate; namely, intangible

losses to his personal life occasioned by an injury which is permanent. The Maine Court correctly found that the Federal Act has no such benefit. 33 U.S.C. § 908(c)(21) compensates wage loss only. *Potomac Electric Power v. Director Office of Workers' Compensation Programs,* 449 U.S. 268, 282, 283 (1980). Moreover, benefits under that section are "permanent" only in the sense that they continue until interrupted by a subsequent administrative order. Meanwhile, they are "payable during the continuance of partial disability." 33 U.S.C. §§ 908(c)(21); 908(h).

The petitioner's assertion that these permanent partial benefits were "in addition to whatever temporary total or temporary partial disability may occur from time to time" is totally unfounded. Even a casual reading of the statute, or the opinions of this Court, or the decision of the Court below, or the record in this case reveals the contrary: an employee may receive at one time either temporary partial benefits or permanent partial benefits, but not both. 33 U.S.C. § 908(c)(21), § 908(e); *Potomac Electric Power v. Director, Office of Workers' Compensation Programs, supra;* Petition for Writ, p. 3-a, 77-a. Thus, the award made under the LHWCA does not remotely resemble Maine's benefit.

Congress has apparently not decided to give a fixed award regardless of the effect of an injury on earning capacity, at least where that injury is to the back. 33 U.S.C. § 908(c)(1)-(20); Petition for Writ 8-a - 9-a. Maine has decided the opposite. *Sun Ship Inc v. Pennsylvania, supra,* intends that an employee may have superior state benefits that are complementary to the federal scheme and not duplicative. 447 U.S. 715, 724 (1980). To subtract from

this unique state award benefits for lost earning capacity paid under the Federal Act would be precisely to defeat that state complementary award. Just as state awards for disfigurement, rehabilitation, child allowances, or attorneys fee should not be undone because an employee has received an award under the Federal Act, so too Maine's permanent impiarment award is separate and distinct element of damages. To hold otherwise is to enforce the doctrine of "election of remedies" which this Court has squarely rejected. *Sun Ship v. Pennsylvania, supra.*

CONCLUSION

The question presented in the Petition is not of such substantial importance that plenary consideration is required. The Supreme Judicial Court of the State of Maine was clearly correct in its judgment and the Petition should be summarily denied.

Dated at Portland, Maine this 22 day of December 1986.

Respectfully submitted,

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